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Supreme Court of the United States

October Term, 1979

Nos. 79-377, 79-378, & 79-379

DOW JONES & COMPANY, INC., et al.,
Petitioners,

v.

UNITED STATES POSTAL SERVICE,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION OF UNITED PARCEL SERVICE

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QUESTION PRESENTED FOR REVIEW

Was the court below correct in adhering to its ruling in a prior case that the Postal Reorganization Act of 1970, 39 U. S. C. § 101 *et seq.*, requires postal rates to be based primarily on cost-of-service principles, with costs not so attributed or assigned being recovered through rates established by the application of other ratemaking criteria set forth in the Act?

STATEMENT OF THE CASE

This case involves the proper interpretation of the ratemaking provisions of the Postal Reorganization Act of 1970, as amended ("Act"), 39 U. S. C. § 3621 *et seq.* The record of the underlying administrative proceeding, the fourth general ratemaking proceeding conducted before the Postal Rate Commission ("commission"), consists of over 20,000 pages. Sixty-four parties participated in the proceeding, and 75 witnesses testified before the commission. As a result of its extensive review of the record,[1] the United States Court of Appeals for the District of Columbia Circuit issued a comprehensive, 95-page opinion on June 8, 1979 (Appendix at A1-95).[2]

In its opinion, the court held that the rates recommended by the commission and approved by the Governors of the United States Postal Service (see 39 U. S. C. § 3625) "represent a reasonable response to [the Act's] governing concepts" (Appendix at A12). Accordingly, the court affirmed the order of the Governors approving the commission's rate recommendations.

The court did not advance any new interpretation of the Act or of its ratemaking provisions. On the contrary, it reaffirmed the ratemaking principles laid down by the Act as interpreted in a prior case involving the second ratemaking proceeding conducted under the Act. See **National Association of Greeting Card Publishers v. United States Postal Service,** 569 F. 2d 570 (D. C. Cir. 1976), *vacated in part on other issues not relevant here sub nom.* **United States Postal Service v. Associated Third Class Mail Users,** 434 U. S. 884 (1977) ("**NAGCP I**"). The

1. The court below heard over three hours of oral argument.

2. References herein to the Appendix are to the Appendix filed by petitioners Dow Jones & Company, Inc., *et al.* A separate appendix was subsequently filed by petitioners Magazine Publishers Association, Inc. and Time Incorporated.

NAGCP I decision in turn reflected the views expressed by the court in a unanimous concurring opinion issued in connection with the first ratemaking proceeding. **Association of American Publishers, Inc. v. Board of Governors of the United States Postal Service,** 485 F. 2d 768, 776-79 (D. C. Cir. 1973).

Thus, petitioners do not contend that the court departed from previously established principles of postal ratemaking, nor do they argue that the Postal Service, the commission, or the court misapplied **NAGCP I.** Rather, they seek to obtain here a rejection of the interpretation of the Act articulated on December 28, 1976, in **NAGCP I,** an interpretation which both the Postal Service and the commission sought to follow in the proceeding which is the subject of the instant petitions.

REASONS FOR DENYING THE WRITS

I.

PETITIONERS' ARGUMENT THAT THE COURT OF APPEALS HAS REQUIRED THE COMMISSION TO USE A FULLY ALLOCATED COSTING METHODOLOGY IS PATENTLY ERRONEOUS.

Petitioners contend that the court of appeals has intruded too deeply into the ratemaking process by insisting that the commission impose "fully allocated costs" upon all classes of mail, with the result that all postal costs are allocated on cost-of-service principles to the neglect of market or demand factors. However, it is clear that the court has never required, and that the commission has never applied, a fully allocated costing methodology. Contrary to the impression that petitioners attempt to create, in the administrative proceeding involved here substantial costs remained unattributed and unassigned by the commission on the basis of cost-of-service principles. In fact, the commission attributed and assigned on costing bases less than 75% of total postal costs of approximately $17.6 billion, leaving a "residuum" of costs of approximately $4.5 billion. Commission Opinion and Recommended Decision, Volume 1, page 156.[3]

Clearly, the court's decision in **NAGCP I** has not led the commission to adopt ratemaking methods pursuant to which "practically all" postal costs would be attributed or assigned on cost-of-service principles so that "only an insignificant residuum of costs" would be left to be allocated on the basis of the non-cost factors of the Act. See 569 F. 2d at 604. Instead, more than a quarter of total postal

3. The commission's decision is set forth in a two-volume supplemental appendix filed by petitioner Dow Jones & Company, Inc. (see Petition, page 2).

costs have not been attributed or assigned on costing bases but have been left as "residual" costs.

Thus, petitioners' arguments are based on a complete misunderstanding or distortion of the commission's decision. For example, it is clear that petitioner Dow Jones is simply incorrect when it states (Petition, page 19, n. 12) that, after the application of cost-of-service principles, the costs allocated on the basis of the other criteria of the Act constitute only 7.14% of total costs. The 7.14% referred to by Dow Jones does not represent the "residuum" of unassigned costs, but rather represents $1.3 billion of "service related" costs which were "reasonably assigned" (as opposed to "attributed") by the commission on costing principles. The residuum in this case is an amount nearly four times greater, or $4.5 billion. The alarm expressed by petitioners is clearly unwarranted.

Furthermore, the court has not imposed on the commission any particular costing or ratemaking methods. Indeed, both in **NAGCP I** and in the decision which gave rise to the instant petitions, the court specifically refused to specify any particular methods to be followed by the commission. **NAGCP I,** 569 F. 2d at 590, 592-93; Appendix at A21-23. After reviewing the language of the Act and its legislative history, the court found that Congress intended that "no particular cost accounting system" be used to the exclusion of other costing methods in setting postal rates. S. Rep. No. 912, 91st Cong., 2d Sess. (1970) at page 17. As a result, the court interpreted the ratemaking scheme established in the Act to require that the commission remain open to explore various methods of cost allocation and not restrict itself to the use of only one methodology to attribute and assign costs.

In its decision here, the court has accepted the "service related" costing method first advocated by the

Postal Service and then used by the commission to assign certain postal costs even though, in the court's view, this particular method is probably not the best method or one which the court itself would have chosen (Appendix at A36-46). This is a classic example of judicial deference to, not, as petitioners claim, judicial usurpation of, administrative discretion.

In short, petitioners' attack on the decision below is grounded on the obviously erroneous premise that the rates recommended by the commission are based on fully allocated costing methods which allocate practically all postal costs on the basis of cost-of-service principles in almost total disregard of the other criteria of the Act. Neither the commission nor the court of appeals has ever adopted or even advocated the interpretation of the Act attacked by petitioners. Accordingly, the Court should decline to review the propriety of the "straw man" interpretation raised by petitioners.

II.

THE COURT OF APPEALS CAREFULLY CONSIDERED AND CORRECTLY DECIDED THE STATUTORY INTERPRETATION ISSUES RAISED BY PETITIONERS.

A. Petitioners' Arguments Have Been Fully Considered and Repeatedly Rejected.

Petitioners advocate a restrictive interpretation of the Act's costing provisions which has repeatedly been rejected by all who have considered it, including the commission (see page 11, n. 9, *infra*).

The Court of Appeals for the District of Columbia Circuit has examined the ratemaking provisions of the Act in depth on at least two occasions prior to the decision attacked here.[4] On the first occasion, in which the court (Bazelon, C.J., and Tamm and Wyzanski, JJ.) reviewed and approved the commission's action in the initial ratemaking proceeding under the Act, it analyzed the ratemaking provisions of the Act in a unanimous concurring opinion written by Chief Judge Bazelon. **Association of American Publishers, Inc. v. Board of Governors of the United States Postal Service**, 485 F. 2d 768, 776-79 (1973) ("**Publishers**"). In that opinion, the court examined the language and legislative history of the Act, and suggested that the congressional intent

> ". . . provides a strong indication that . . . discretionary or 'reasonable' assignment of costs should apply only where Postal Service simply *could not* 'attribute' costs. . . . [The Postal Service] would be required to itemize its costs in more detail, determine which classes of service caused them, and attribute those costs solely on that basis." 485 F. 2d at 779 (footnote omitted).

The court upheld the rates there recommended by the commission in light of "the presumptions that surround an initial effort to formulate rates." *Id.* However, it admonished the Postal Service and the commission to "take a hard look" at the extent to which those rates were based on factors other than the costs of the various postal services. *Id.*

The second ratemaking proceeding was also reviewed by the Court of Appeals for the District of Columbia Circuit in **NAGCP I.** This time, Chief Judge Bazelon and Judges Robinson and MacKinnon, in a comprehensive *per curiam* opinion, held that the commission's refusal,

4. The court has also reviewed specific aspects of the ratemaking scheme established by the Act on several other occasions. See 569 F. 2d at 575, n. 2 and accompanying text.

based on an alleged absence of precise statistical measurements, to attribute to the various classes of mail costs which the commission had admitted were attributable (569 F. 2d at 581, 590-91), violated ". . . the express statutory command that in setting postal rates every reasonable effort be made to employ cost-of-service principles to the fullest extent possible." 569 F. 2d at 593.[5]

The instant case involves the fourth general ratemaking proceeding conducted under the Act. In a unanimous *per curiam* order supported by exhaustive opinions for the court by Judges Leventhal and Tamm,[6] the court reaffirmed its holding in **NAGCP I**—a holding which had been foreshadowed by the unanimous concurring opinion in the **Publishers** case—that the Act requires postal rates to be based primarily (though not exclusively) on cost-of-service principles and found that the commission had been responsive to that statutory requirement.

The court in **NAGCP I** had conducted a thorough review of the Act and of its legislative history. See 569 F. 2d at 585-89. It explicitly addressed the specific portion of the legislative history so heavily relied on by petitioners here—the statement of the managers on the part of the House (see, *e.g.*, Petition of American Business Press at pages 11-12)—and found that, contrary to petitioners' claims, the statement supports the view that Congress intended postal rates to be based primarily on cost-of-service principles. See 569 F. 2d at 586, n. 58 and accompanying text. The court's analysis of the Act's

5. Judge MacKinnon filed a concurring opinion in which he stated that ". . . the [court's] opinion [should] not be read as requiring that practically all postal costs be attributed or assigned . . . [on] cost-of-service principles . . . , with the result that only an insignificant residuum of costs are assigned in accordance with the seven remaining statutory considerations." 569 F. 2d at 604.

6. Chief Judge Bryant of the District Court for the District of Columbia was the third member of the panel.

legislative history, which is far more thorough and exhaustive than that presented in the instant petitions, is a full answer to petitioners' contrary arguments.

In the proceeding involved here, the court again reviewed the history of postal ratemaking and the Act's ratemaking standards, and refused to declare that **NAGCP I** was "wrongly decided" or "fatally flawed" (Appendix at A23, n. 23). The court explicitly addressed post-enactment "legislative history" upon which petitioners rely and concluded that congressional rejection of a clarifying amendment considered some five years after the Act was passed does not require a reevaluation of the validity of **NAGCP I** (Appendix at A23, n. 23). Rather, it concluded that **NAGCP I** was correctly decided (Appendix at A19-21).

Thus, a total of seven different judges in three separate cases have reviewed the language of the Act, the Act's legislative history, and the commission's application of the statutory ratemaking standards, and all have concurred that the Act requires the commission to base its rate recommendations primarily on cost-of-service principles. In light of this fact, it is not surprising that the court in this case unanimously denied a suggestion for hearing *en banc* which was based largely on the same arguments advanced in the present petitions.[7]

7. In **NAGCP I,** Judge MacKinnon stated that the Act's requirement of cost-based rates should not be overemphasized so as to negate completely the other factors set forth in the Act. Petitioners rely heavily on language in Judge MacKinnon's concurring opinion in **NAGCP I,** implying that at least he would not agree with the decision at issue here. However, Judge MacKinnon joined in the **NAGCP I** decision now challenged by petitioners. Even more significantly, in the proceeding involved here, not one judge—including Judge MacKinnon—even called for a vote on a suggestion for hearing *en banc* made for the express purpose of seeking to overturn the earlier **NAGCP I** decision. Similarly, in **NAGCP I,** the court denied a petition for rehearing and suggestion for rehearing *en banc*.

Petitioners do not advance any arguments which have not already been thoroughly considered and rejected by different panels of the court of appeals on three separate occasions. Petitioners' belated attempt to attack the established interpretation of the Act advanced in 1976 in **NAGCP I** and foreshadowed in 1973 in **Publishers** should be rejected.

B. Petitioners' Statutory Interpretation Argument Is Without Substance.

Petitioners contend that the court of appeals has erred in interpreting the Act by giving undue weight to the congressional use of the term "requirement" in Section 3622(b)(3),[8] the costing criterion of the Act, and that the

8. Section 3622(b), which sets forth the ratemaking standards of the Act, provides:

"(b) Upon receiving a request, the Commission shall make a recommended decision on the request for changes in rates or fees in each class of mail or type of service in accordance with the policies of this title and the following factors:

(1) the establishment and maintenance of a fair and equitable schedule;

(2) the value of the mail service actually provided each class or type of mail service to both the sender and the recipient, including but not limited to the collection, mode of transportation, and priority of delivery;

(3) the *requirement* that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type;

(4) the effect of rate increases upon the general public, business mail users, and enterprises in the private sector of the economy engaged in the delivery of mail matter other than letters;

(5) the available alternative means of sending and receiving letters and other mail matter at reasonable costs;

(6) the degree of preparation of mail for delivery into the postal system performed by the mailer and its effect upon reducing costs to the Postal Service;

costing standard actually set forth in Section 3622(b)(3) was really meant to be the same as the standard of "demonstrably related costs" which was contained in an earlier version of the House bill but which was deleted from the version of the bill which ultimately became the Act. Curiously, petitioners contend that the court of appeals has improperly intruded into the administrative process and refused to defer to the commission's expertise by not adopting an interpretation of the Act which the commission itself rejected eight years ago.[9]

Of course, the court was clearly correct in refusing to ignore the unequivocal language of the Act, which uses the term "requirement" with respect only to the cost recovery criterion of the Act. Congress provided in Section 3622(b) of the Act that the commission "shall" make its recommended rate decisions in accordance with all of the factors set forth in that section. However, it went further in the

8. (Cont'd.)

(7) simplicity of structure for the entire schedule and simple, identifiable relationships between the rates or fees charged the various classes of mail for postal services;

(8) the educational, cultural, scientific, and informational value to the recipient of mail matter; and

(9) such other factors as the Commission deems appropriate." 39 U. S. C. § 3622(b)(3) (emphasis added).

9. Petitioners Magazine Publishers Association, Inc. and Time Incorporated are clearly incorrect when they state in their petition (page 6) that in the first postal rate proceeding the Postal Service and the commission "evidenced the same general understanding of the Congressional directive, set forth in § 3622(b)." On the contrary, the commission stated in its decision in that proceeding: "If Congress shared the [Postal] Service's costing theories, it certainly refrained from writing them into the statute." **Postal Rate and Fee Increases, 1971,** Docket No. R71-1, Volume 1, Opinion and Recommended Decision at page 1-276. The Postal Service's costing theories were based on the "demonstrably related costs" language, which it had originally proposed. Thus, even before the court of appeals first reviewed the Act in **Publishers,** the commission itself had rejected the statutory interpretation advocated by petitioners here.

case of the cost recovery criterion and characterized that criterion—and that criterion alone—not only as a factor which shall be considered, but as a *requirement*. In light of the elemental principle of statutory construction that effect must be given to all of the words of a statute, 2A Sutherland, **Statutory Construction** § 46.06 (3d rev. ed. 1973), the court would have been remiss had it ignored that phrase and in effect had read it out of the Act, as petitioners contend it should be.

In any event, the court did not stop there. It also examined the other language of the Act and the overall statutory scheme. It went on to make a searching review of the legislative history of the Act and found that the legislative history also demonstrates that postal rates must be based largely on costing principles. Thus, the court's holding is not based solely—or even primarily—on the use of the term "requirement" in Section 3622(b)(3), as petitioners contend.

In arguing that the court below misread the legislative history, petitioners improperly rely on their own view of the "demonstrably related costs" language contained in a prior version of the House bill.[10] Their argument that the rejected phrase "demonstrably related costs" should be seen as the same as the phrase "direct and indirect postal costs attributable . . . plus that portion of all other costs of the Postal Service reasonably assignable" contained in the Act as enacted is based on a brief passage contained in the "Statement of the Managers on the Part of the House" (the "House Managers' Statement") and the remarks of two House members made three days after the Senate had

10. In **NAGCP I,** the court examined the language upon which petitioners base their restrictive view of this costing standard and concluded that it supports the view that postal rates must be based primarily on cost-of-service principles. 569 F. 2d at 586, n. 28 and accompanying text.

agreed to and accepted the report of the Conference Committee.

The Conference Committee purposely deleted the "demonstrably related costs" language in favor of the "direct and indirect attributable" and "reasonably assignable" cost language actually contained in the Act. It is well-established that the adoption of an amendment to or the deletion of a paragraph or phrases from a bill in conference is strong evidence that Congress intended to change the substance and meaning of the original bill. **Gulf Oil Corp. v. Copp Paving Co., Inc.,** 419 U. S. 186, 199-200 (1974); **Cudahy Packing Co. v. Holland,** 315 U. S. 357, 366 (1942).

Even were the rejection of the "demonstrably related costs" concept not so clear, the courts have repeatedly voiced their distrust of regarding as "legislative history" statements made in one House that were not agreed to or acknowledged by the other House. See, *e.g.*, **Pennsylvania Railroad Co. v. International Coal Mining Co.,** 230 U. S. 184, 198-99 (1913); **Davidson v. Gardner,** 370 F. 2d 803, 827-28 (6th Cir. 1966); **The Pietro Campanella,** 73 F. Supp. 18, 27 (D. Md. 1947). Thus, both the House Managers' Statement and the remarks of the two congressmen relied on by petitioners are not proper indicators of legislative intent. Clearly, petitioners' statutory interpretation argument is without merit.

CONCLUSION

Petitioners' attempt to use the decision in question here to obtain this Court's review of an earlier decision of the United States Court of Appeals for the District of Columbia Circuit should be rejected. Petitioners' arguments are based on a purported interpretation of the Act which in fact was not made by the court of appeals, and on the asserted use by the commission of fully allocated costing methods which in fact were not employed by it. Petitioners do not raise any issues which have not already been carefully considered and repeatedly rejected. Since petitioners' claims are so clearly without merit, the petitions should be denied.

Respectfully submitted,

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